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# United States Department of the Interior

## FISH AND WILDLIFE SERVICE


Washington, D.C. 20240

APR 11 2018



### Memorandum

To: Service Directorate

From: Principal Deputy Director 

Subject: Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act

To ensure consistency with the recently issued M Opinion, the U.S. Fish and Wildlife Service (FWS) is modifying some policies and practices within its programs. This memorandum provides guidance to clarify what constitutes prohibited take, what actions must be taken when conducting lawful intentional take (e.g., obtain a permit via 50 C.F.R. Part 21), and what changes to prior practice should be made in light of the M-Opinion.

The M-Opinion concludes that the take of birds resulting from an activity is not prohibited by the MBTA when the underlying purpose of that activity is not to take birds. We interpret the M-Opinion to mean that the MBTA's prohibitions on take apply when the *purpose* of an action is to take migratory birds, their eggs, or their nests. Conversely, the take of birds, eggs or nests occurring as the result of an activity, the purpose of which is not to take birds, eggs or nests, is not prohibited by the MBTA.

The mission of the Service is to work with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. Migratory bird conservation remains an integral part of our mission. Further:

1. The Endangered Species Act (16 U.S.C. 35 § 1531 et seq.; ESA) and Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668c; Eagle Act), as well as some State laws and regulations are not affected by the M-Opinion.
2. The National Environmental Policy Act (NEPA, 42 U.S.C. § 4321 et seq.) provides a process under which federal agencies must evaluate the impacts of their actions on the human environment [including the natural and physical environment and relationship of people with that environment (40 C.F.R. § 1508.14)] and provide transparency to the American public. Birds are part of the human environment, and should be included in relevant environmental review processes as directed by NEPA.

The Service will continue to work with any partner that is interested in voluntarily reducing impacts to migratory birds and their habitats. We will continue to develop best management practices to protect migratory birds and their habitats in partnership with any industry, federal, state, and tribal entity as interest dictates, and in the course of project review, will continue to

provide recommendations through our advisory role under other authorities, including NEPA and the Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-667e). The Service will clearly communicate relevant authorities under which we make our recommendations. The Service will ensure that our comments, recommendations, or requirements are not based on, nor imply, authority under the MBTA to regulate incidental take of migratory birds. Furthermore, the Service will not withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA. Attached is a set of questions and answers that serve to clarify the effect of the M-Opinion.

If you have additional questions, please contact the Migratory Bird Program, 202-208-1050.

Attachment

## ATTACHMENT

### FREQUENTLY ASKED QUESTIONS REGARDING IMPLEMENTATION OF THE M-OPINION

1. **Clarity on the distinction between *intent* to take a bird versus *knowing* a bird will be taken. Does the underlying legality of an activity that takes birds affect that distinction and does *reducing a bird to possession* have any bearing on the situation? The following examples are real situations the Service may face under the new M-Opinion:**

- a. **A State Department of Transportation wants to paint a bridge. Prior to painting the bridge, all Barn Swallow nests are pressure washed off the bridge, which would result in destruction of eggs and death of nestlings. Is the intentional removal of nests prior to painting the bridge intentional take and does it require a permit prior to the action?**

Answer: Yes. The intentional removal of active barn swallow nests, killing eggs and nestlings, is an affirmative act that has the taking of active nests and contents as its purpose. Because this example stipulates that the removal of nests prior to painting was purposeful, a permit would be required to legally authorize this activity. If the intent was to simply paint the bridge and the nests were accidentally destroyed incidental to that process, that destruction would not violate the MBTA.

- b. **A homeowner knows that Chimney Swifts are nesting in their chimney. If the homeowner lights a fire and destroys the nests, is this considered intentional take or incidental take under the M-Opinion?**

Answer: Possibly either, but more information is needed to determine whether the homeowner lit the fire to intentionally destroy swift nests or simply lit the fire to heat the house. The difference between this activity and the previous example is the subjective purpose of the activity. The intentional destruction of chimney swift nests by lighting a fire would constitute an intentional act, the purpose of which is to destroy nests. Whether lighting the fire violates the MBTA in that scenario would also depend on whether nests are active and contain eggs, young, or adult birds that could not escape quickly enough. A permit would be required to legally authorize this activity if the purpose is to destroy nests and they are active. A permit would not be needed if the homeowner lit the fire for the purpose of heating the house regardless of whether they were aware of swift nests in the chimney. Note that although knowledge of the presence of a nest or nests before lighting a fire would not be enough by itself to constitute a violation of the Act, it could be used as evidence to show the homeowner did in fact light the fire with the purpose of destroying the nests.

- c. Is removing a structure (e.g., dilapidated barn) with known nesting owls in the barn, which will die with the destruction of the barn, a violation of MBTA? How does knowledge or reasonable foreseeability that that an activity will kill birds affect whether that action violates the MBTA?**

Answer: This would not be a violation of the MBTA. Removing or destroying the structure would rarely if ever be an act that has killing owl nestlings as its purpose. Again, the purpose of the activity determines whether this is an MBTA violation. Unless the purpose of removing the structure was in fact to kill the owls, their deaths would be incidental to the activity of removing the barn. The landowner's knowledge, or whether it was reasonably foreseeable, that destroying the barn would kill the owls is not relevant. All that is relevant is that the landowner undertook an action that did not have the killing of barn owls as its purpose.

This same analysis would apply to other structures, such as bridges.

- d. A rancher shoots Black Vultures on his property without obtaining a depredation permit (50 C.F.R. § 21.41 – Depredation Permits). The rancher leaves the dead birds without subsequently collecting (possessing) them. Does the desire to, or failure to reduce a bird to possession affect whether that action violates the MBTA?**

Answer: Shooting Black Vultures without a permit violates the MBTA because it is an affirmative action that has killing birds as its purpose. The traditional definition of the term "take" includes reducing wildlife to human control, as noted in the M-Opinion. However, purposeful killing does not necessarily require any desire or affirmative action to gain possession of the birds. Shooting and killing migratory birds renders them subject to human control whether or not the shooter physically takes possession of the bodies. In fact, this issue was expressly addressed in footnote 132 of the M-Opinion: "We note that this language makes clear that the sort of 'human control' referred to by Justice Scalia includes the act of intentionally killing even in the absence of further intent to reduce the particular animal to human possession. Thus, intentional killing is itself a form of 'human control'." Note that shooting at and missing a black vulture would also be a violation (attempt), which obviously could not result in reducing the bird to possession.

- 2. How does the legality of an activity affect the determination of whether it is an MBTA violation or not? For example, if an illegal activity kills birds, but that was not the intent of the activity (e.g., using a banned pesticide, or without following application labels in violation of Federal Insecticide Fungicide Rodenticide Act (FIFRA)) is this still considered an incidental taking that is not a violation of the MBTA?**

Answer: The legality of an activity does not affect the determination of whether it results in an MBTA violation. Thus, if the landowner in the example used the pesticide with specific intent to kill birds, it would violate the MBTA. However, if the landowner used a pesticide to purposely kill something other than migratory birds, it would not be a violation if birds die as

a result because the purpose of the act was not taking of birds. If the landowner used a pesticide with the general intent of killing wildlife, and the pesticide killed protected bird species, that could be a violation of the MBTA but liability would likely turn on the facts of the specific case. Note, applying a pesticide illegally in a way that ends up killing birds when they are not the intended target may not be an MBTA violation, but the fact that birds died may still provide additional evidence for prosecuting the FIFRA violation.

**3. How does the M-Opinion affect existing statutory amendments to the MBTA that specifically address incidental take, such as P.L. 107-314, Sec. 315 and subsequent regulation (50 C.F.R. § 21.15 – Authorization of take incidental to military readiness activities) or P.L. 114-94, Sec. 1439 (the FAST Act)?**

Answer: The M-Opinion does not affect the military-readiness rule at 50 C.F.R. § 21.15, which was the result of Congress's direction to the Secretary of the Interior to prescribe regulations authorizing incidental take of migratory birds during military-readiness activities. Thus, the Secretary could only withdraw the rule if directed to do so through subsequent legislation. As the M-Opinion explains, "Congress was acting in a limited fashion to preempt a specific and immediate impediment to military-readiness activities." M-Opinion, p. 31. FWS and the Department of Defense (DOD) should continue to follow the requirements of the military-readiness rule. Nonetheless, incidental take of migratory birds by DOD does not violate the MBTA, regardless of whether DOD is complying with the terms of the military-readiness rule.

The FAST Act authorizes take of nesting swallows that interfere with bridge construction in certain circumstances. In most circumstances, such take would be considered purposeful and thus prohibited by the MBTA. Accordingly, the M-Opinion should not affect authorization of the take of active swallow nests. To the extent the FAST Act was intended to authorize incidental take, the terms of that statute should still be complied with for the same reasons discussed above for the military-readiness rule legislation.

**4. What effect does the M-Opinion have on current settlement agreement negotiations to address incidental take of migratory birds or court-mandated permits resulting from past settlement agreements?**

Answer: Current settlement agreement negotiations should not address incidental take of migratory birds for purposes of enforcing the MBTA, but may still include measures necessary to comply with other relevant statutes when appropriate (for example statutes implemented by the Natural Resource Damage Assessment and Restoration program (NRDAR, as explained below). The Department is currently reviewing the Service's position on current negotiations to address incidental take of bald and golden eagles under the Eagle Act. These species are also covered under the MBTA. The Service has brought seven enforcement actions against companies for incidental take of eagles since 2015, which included both MBTA and Eagle Act charges. Only one of these remains unresolved; the other six were resolved through settlement agreements. The Service will no longer pursue MBTA charges against projects that cause eagle deaths, but the M-Opinion does not affect the Service's ability to bring Eagle Act claims in these cases.

We are not aware of any court-authorized settlement agreements that mandate obtaining a permit to cover future incidental take of migratory birds under the MBTA. Since 2013, the Department of Justice has brought two prosecutions for take of eagles and species protected only by the MBTA. These prosecutions were resolved at the request of defendants based on MBTA violations only, although the conduct could also have been charged under the Eagle Act with regard to the eagle deaths. These plea agreements provided that companies must implement plans aimed at preventing bird deaths at eight commercial wind projects and apply for eagle permits to cover incidental take of eagles under the Eagle Act. The Service Chief of Law Enforcement's Directive applying to civil administrative enforcement of avian take at wind projects includes a limited option for settlements to resolve violations of the MBTA. However, that option is no longer operable after issuance of the M-Opinion. We are currently determining whether the M-Opinion will require the Service to revisit past settlement agreements that require ongoing implementation of best management practices to avoid or reduce incidental take of migratory birds by wind-energy facilities and other industrial activities.

**5. How does the M-Opinion affect the Natural Resources Damage Assessment program (i.e., specifically related to oil spills)?**

Answer: The M-Opinion does not directly affect the NRDAR program because statutory authorities that provide the basis for the program do not include the MBTA. Pursuant to Comprehensive Environmental Response Compensation and Liability Act, Oil Pollution Act, and Clean Water Act, the Department is authorized to assess injury to natural resources caused by releases of hazardous substances and discharges of oil to compensate the public for lost natural resources and their services. The Department's assessment of natural resource injuries under the NRDAR program include any injury to migratory birds, which in many cases could otherwise be classified as incidental take.

In practice, however, the M-Opinion will have an effect on future claims seeking fines or penalties for violations of the MBTA from companies responsible for oil spills and hazardous releases. In addition to pursuing damage claims under the NRDAR program, the Department has pursued MBTA claims against companies responsible for oil spills that incidentally killed or injured migratory birds. That avenue is no longer available.

**6. How does the M-Opinion affect consultations or habitat conservation plans under sections 7 and 10 of the ESA?**

Answer: When processing Habitat Conservation Plans under Section 10 or consulting on Section 7 of the ESA, incidental take coverage should only include listed species listed under the ESA. As concluded in the M-Opinion, incidental take of migratory birds is not prohibited so no restrictions, minimization measures, or mitigation should be part of an incidental take permit or an incidental take statement for purposes of the MBTA (rather than the ESA). An applicant or federal government action agency can take voluntary measures related to migratory birds but it must be made clear that no such actions are required by the MBTA.

**7. How does the M-Opinion affect technical assistance under the Avian and Bat Conservation Plans?**

Answer: Technical assistance can still be given in development of Avian and Bat Conservation Plans. However, any suggestions or guidance related to migratory birds must be relayed as completely voluntary actions. Part of the technical assistance should include the statement that incidental take of migratory birds is not prohibited by the MBTA.